90-1316

Supreme Court, U.S.
FILED
DEC 27 1990
JOSEPH F. SPANIOL, JR.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CAROLYN PRATT PERRY,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Carolyn Pratt Perry,
Petitioner
Acadian Centre
Suite 420
2431 So. Acadian Thruway
Baton Rouge, LA 70808
(504) 928-6898
In Proper Person

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CAROLYN PRATT PERRY,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Carolyn Pratt Perry,
Petitioner
Acadian Centre
Suite 420
2431 So. Acadian Thruway
Baton Rouge, LA 70808
(504) 928-6898
In Proper Person

QUESTION PRESENTED

This case presents a single question of federal law, one that affects millions of tax payers, that is based on undisputed facts, and that has split the Court of Appeals in dicta or legal theory:

Does the Internal Revenue Code give the Internal Revenue Service the unilateral right to deny a valid deduction for money designated for and actually spent for support (child support and/or alimony), and, thus, allow the Internal Revenue Service to receive double taxation on those designated funds and to reap a windfall, when a former spouse fails to pay court ordered support?

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....2

JURISDICTION.....3

FEDERAL STATUTES INVOLVED.....3

STATEMENT OF THE CASE.....6

Nature of the case.....6

Statement of facts.....12

Procedural history.....14

REASONS FOR GRANTING THE WRIT.....15

I. THE FIFTH CIRCUIT'S DECISION TO DENY A TAXPAYER'S DEDUCTIONS FOR SUPPORT PAYMENTS SHE MADE ON BEHALF OF HER FORMER SPOUSE WITH FUNDS FROM HER OWN CAPITAL ASSETS OR INCOME CONFLICTS WITH THE LEGAL ANALOGY IN A NINTH CIRCUIT COURT OF APPEALS DECISION.....15

II. THE FIFTH CIRCUIT ERRED, AS A MATTER OF LAW, BY ITS CONSTRUCTION OF THE APPLICABLE PROVISIONS OF THE INTERNAL REVENUE CODE AND WITHOUT REGARD FOR THE INTENT OF CONGRESS.....18

CONCLUSION.....25

APPENDICES.....27

Suggestion for Rehearing En Banc 28

Perry v. Commissioner,
Nos. 89-4845, 89-4848
(5th Cir. 1990) 30

Perry v. Commissioner,
92 T.C. No. 28 (1989) 43

Decision, No. 6507-83 82

Decision, No. 14905-84 83

Decision, No. 15225-84 84

Partial Stipulation to be
Bound, No. 13549-87 85

Order, No. 13549-87 88

Decision, No. 13549-87 89

Perry vs. Perry, No. C-1644,
Fulton Superior Court, Georgia
Final Judgment and Decree 91

TABLE OF AUTHORITIES

CASES PAGE

Cotnam v. Commissioner of Internal Revenue, 263 F.2d 119 (5th Cir. 1959)....17

Imeson v. Commissioner of Internal Revenue, 487 F.2d 319 (9th Cir. 1973).....16, 23, 24

In re Sanderfoot, 899 F.2d 598 (7th Cir. 1990).....10

Iowa Southern Utilities v. United States, 348 F.2d 492 (Ct.Cl.1965).....16, 17, 23

Mandel v. Commissioner, 229 F.2d 328 (7th Cir. 1956).....21

Pearlstein v. Mattes, 199 So. 151 (La. App. 1941).....23

Putnam v. Commissioner, 352 U.S. 82,77 S.Ct. 175, 1 L.Ed.2d 144 (1956).....16

Shirman v. Commissioner, 60 F.2d 65 (2d Cir. 1932).....16

Swenson v. Commissioner, 43 T.C. 897 (1965).....16, 18

United States v. Safety Car Heating and Lighting Co., 297 U.S. 88, 56 S.Ct. 353, 8 L.Ed. 500 (1936).....17

STATUTORY PROVISIONS PAGE

Internal Revenue Code, Sec. 161.....3

Internal Revenue Code, Sec. 165.....3

Internal Revenue Code, Sec. 166.....4

Internal Revenue Code, Sec. 1011.....6

Internal Revenue Code, Sec. 1012.....6

La. Civil Code (1870) Art. 2161.....22

OTHER AUTHORITIES

U.S. Department of Commerce, Statistical Abstract of the United States 89 (1990)...7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. _____

CAROLYN PRATT PERRY,
petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Carolyn Pratt Perry petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit entered in this case on August 15, 1990, with the petition for rehearing en banc being denied on September 28, 1990.

OPINIONS BELOW

The denial of the rehearing en banc is attached in the appendix ("App.") to this petition. App., p. 28.

The opinion of the Court of Appeals is an unpublished opinion recorded at 912 F.2d 1466 (1990), a copy of which is attached in the appendix to this petition. App., p. 30. The decision of the U.S. Tax Court (Chabot, J.), which the Court of Appeals affirmed is recorded at 92 T.C. 28. App., pp. 82-84.

The decision of the U.S. Tax Court (Chabot, J.), which the Court of Appeals affirmed based on Judge Chabot's opinion at 92 T.C. No. 28, pursuant to the partial stipulation to be bound, the assignment of the case to Judge Chabot, and the decision rendered based on his prior opinion. App., pp. 85-90.

The final judgment and decree rendered by the Superior Court for Fulton County, Atlanta Circuit, Georgia has not been reported. A copy of this final judgment and decree are attached in the appendix. App., pp. 91-110.

JURISDICTION

The Court of appeals entered its denial for a rehearing en banc on September 28, 1990. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. Section 1254(1).

FEDERAL STATUTES INVOLVED

Internal Revenue Code of 1954, Sections in effect for the years in issue.

PART VI - ITEMIZED DEDUCTIONS FOR INDIVIDUALS AND CORPORATIONS

Section 161. Allowance of deductions:

In computing taxable income under section 63, there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible).

Section 165. Losses (in part):

(a) General rule. - There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

(b) Amount of deduction. - For purposes of subsection (a), the basis for determining the amount of the deduction for any loss shall be the adjusted basis provided in section 1011 for determining the loss from the sale or other disposition of property.

(c) Limitation on losses of individuals. - In the case of an individual, the deduction under subsection (a) shall be limited to-

(1) losses incurred in a trade or business;

(2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; and

(3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. A loss described in this paragraph shall be allowed only to the extent that the amount of loss to such individual arising from each casualty, or from each theft, exceeds $100.00 . . .

(d) Wagering losses. - Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

(e) Theft losses. - For purposes of subsection (a), any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss.

(f) Capital losses. - . . .

Section 166. Bad debts (in part):

(a) General rule. -

(1) . . .

(b) Amount of deduction. - For purposes of subsection (a), the basis for determining the amount of the deduction for any bad debt shall be the adjusted basis provided in section 1011

for determining the loss from the sale or other disposition of property.

(c) Reserve for bad debts. - . . .

(d) Nonbusiness debts. -

(1) General rule. - In the case of a taxpayer other than a corporation-

(A) subsections (a) and (c) shall not apply to any nonbusiness debt; and

(B) where any nonbusiness debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 1 year.

(2) Nonbusiness debt defined.- For purposes of paragraph (1), the term "nonbusiness debt" means a debt other than -

(A) a debt created or acquired (as the case may be) in connection with a trade or business of the taxpayer;

(B) a debt the loss from the worthlessness of which is incurred in the taxpayer's

trade or business.

(e) Worthless securities. - . . .

Section 1011. Adjusted basis for determining gain or loss (in part):

(a) General rule. - The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis (determined under section 1012 or other applicable sections of this subchapter . . .

Section 1012. Basis of property-cost (in part):

The basis of property shall be the cost of such property, . . .

STATEMENT OF THE CASE

NATURE OF THE CASE.

This case involves a taxpayer's right to itemized deductions afforded under Sections 161, et seq., of the Internal Revenue Code. The issue is whether petitioner, and millions of other taxpayers similarly situated, is entitled to a deduction when she expended her own capital assets and income to pay for and provide the support specified as her ex-husband's obligation in their final judgment and decree of divorce, because of his failure to make those support

payments.

With its decision, the U.S. Court of Appeals for the Fifth Circuit merely "rubber stamped" prior Tax Court decisions on the grounds that there was no basis in the debts. The Fifth Circuit completely failed to analyze the true nature of the transaction underlying the judgment and the subsequent payments by the petitioner from her capital or income. The payments created the debt or the loss for which she is entitled to a deduction under the Internal Revenue Code. This decision by the Fifth Circuit has created, in dicta or legal theory, at least, a division or conflict with the Ninth Circuit. It involves a question that inevitably affects many of the approximatley 1.2 million divorces granted every year in this country.[1] The Internal Revenue Code can now be and is being used by the Internal Revenue Service to generate a windfall or double

---

[1]U.S. Department of Commerce, Statistical Abstract of the United States 89 (1990).

taxation on the same designated support obligations or funds.

In the case of child support payments, if the ex-spouse fails to provide that support, the Internal Revenue Service receives tax on the full amount of his income. Additionally, the single parent who has custody of the child is forced to go to work to earn additional income to provide the child support for which her former husband is legally obligated, to actually make his support payments from her own income, and the Internal Revenue Service taxes that income, notwithstanding the fact that child support payments, when made to the custodial parent so that she can pay the bills for food, shelter, medical expenses, etc. incurred by the children, are not taxed to the custodial parent.

Alimony payments were treated similarly prior to 1942. In 1942 when Congress passed a significant increase in income taxes, it was concerned that divorced husbands would not have sufficient funds to pay their taxes on their entire income, as well as be able to pay their

alimony; therefore, Congress transferred the tax liability on alimony to the wife, fictitiously treating it as income to her. In the case of alimony, the obligation remains the same as for child support, to provide support (food, shelter, clothing, etc.). As a practical matter both the child support and the alimony payments generally are not paid directly to the landlord, the butcher, or the baker, but are instead paid to the wife or custodial parent for disbursement to the appropriate creditor for these necessities. When an ex-spouse makes an alimony payment, he is entitled to a direct adjustment to his income for those payments, thereby reducing his adjusted gross income and the Internal Revenue Service receives taxes based on that lower tax bracket at a lower rate. If he fails to make those alimony payments, the Internal Revenue Service then receives tax on his full income without that adjustment, and this automatically puts him in a higher tax bracket and at a higher tax rate. On the other hand, if the wife does not receive the alimony

payments, then she must seek state or federal aid to obtain the necessary support, or she must seek additional employment to pay for those items of support which were to be paid by her former spouse. She, likewise, is taxed on this additional income. Therefore, when an ex-spouse fails to make the court ordered alimony payments, the Internal Revenue Service is receiving income tax on all income received by the ex-spouse at a higher rate, and, additionally, is receiving additional income tax on those funds earned as income by the wife to meet these obligations and pay these debts. The result is similar to that noted by Judge Richard Posner in his dissent in In re Sanderfoot, 899 F.2d 598(7th Cir. 1990), in that it is a perversion of tax law that offends the moral sense of laymen by permitting the IRS to manipulate federal tax law to reap a windfall, when a debtor spouse fails to make court ordered support payments on behalf of his children or former wife.

This potential inequity in the IRS and Tax

Court rulings, which hold that these debts were not deductible items, has been recognized and discussed by the Ninth Circuit, in dicta, but was not resolved because in that case the taxpayer had failed to prove the amounts she actually expended to support her children (the "basis"). No other circuit has addressed this issue with the same critical legal analysis. The Fifth Circuit merely rubber stamped the Internal Revenue Service's position and the Tax Court's decision. The issue of whether a taxpayer is entitled to a deduction under the Internal Revenue Code for capital assets or income that she spends to provide the support which her former spouse fails to provide impacts millions of single parents and divorcees throughout the nation on an annual basis. Depending upon her own income, that deduction may be relatively small (equivalent to a winter coat for one of her children) or larger (equivalent to a year's tuition for college for one of her children). In either event the impact is significant. Only this Court, by

resolving the question, can insure certain and equal treatment with appropriate construction of the federal tax law, one which preserves the Internal Revenue Service's right to receive tax on taxable income, and also preserves the tax payer's right to deductions for losses or non-business bad debts without giving the Internal Revenue Service a windfall when a debtor spouse fails to make his support obligations.

STATEMENT OF FACTS.

The facts of this case are undisputed. Petitioner, Carolyn Pratt Perry, married Richard Donald James Perry on November 26, 1966. During the first two and a half years of their marriage she worked as an analytical chemist while he attended college as a full time student. They had two children, a daughter born in 1970, and a son born in 1972. After Mr. Perry was discharged from the Army, he and his family moved to Atlanta, Georgia, where they bought a home. He was employed as a marketing manager for a corporation in Georgia, and she was a

housewife. They were divorced on June 23, 1975, by judgment of the Superior Court of Fulton County, Georgia, which incorporated a property settlement and support agreement. App., pp. 91-110.

In June of 1976, Mr. Perry informed petitioner that he would not make any of the payments under the divorce decree. At that time, petitioner was unemployed and attending school. Petitioner then began a long series of enforcement efforts, including the filing of a complaint under the Uniform Reciprocal Enforcement of Support Act, obtaining a judgment for accrued support payments, obtaining a writ of fieri facias from the Georgia court for child support arrearages in 1979, and obtaining another writ of fieri facias for arrearages in support payments from 1979-1985. However, she did not seek writs of fieri facias for those arrearages labeled in the agreement as "alimony", because she had been advised by counsel that the fieri facias procedure was not available for those payments. Mr. Perry never

made those payments, and therefore, petitioner was forced to spend her own capital assets and income to provide the support for her children and herself mandated as Mr. Perry's obligations by the divorce decree and judgment.

For the tax years 1980, 1981, 1982, and 1984, petitioner claimed deductions for the debts she had actually paid on behalf of her former spouse in the amounts as set out in the divorce decree and judgment.

The Internal Revenue Service disallowed the deduction and served a notice of deficiency.

PROCEDURAL HISTORY.

Petitioner then filed a petition in the U.S. Tax Court for the tax years 1980, 1981, and 1982. These were tried by Judge Herbert L. Chabot, and the matter was taken under advisement. Subsequently, after receipt of the notice of deficiency for the tax year 1984, she filed a petition in the U.S. Tax Court and it was assigned to Judge Chabot for disposition, pursuant to a stipulation to be bound entered

into between petitioner and the Commissioner of Internal Revenue. App., pp. 85-90.

Judge Chabot filed his opinion on March 16, 1989, holding that "petitioner is not entitled to a bad debt deduction for any of the years because she has no basis in any of the debts. Swenson v. Commissioner, 43 T.C. 897 (1965), followed."

The cases were consolidated on appeal to the Fifth Circuit Court of Appeals, and were affirmed without any discussion whatsoever of the analogies and the legal reasoning discussed by the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. **THE FIFTH CIRCUIT'S DECISION TO DENY A TAXPAYER'S DEDUCTION FOR SUPPORT PAYMENTS SHE MADE ON BEHALF OF HER FORMER SPOUSE WITH FUNDS FROM HER OWN CAPITAL ASSETS OR INCOME CONFLICTS WITH THE LEGAL ANALOGY IN A NINTH CIRCUIT COURT OF APPEALS OPINION**

The Fifth Circuit Court of Appeals affirmed the Tax Court's decision that petitioner was not entitled to the bad debt deduction, because she had no basis in any of the debts. It likewise cited the Swenson case,[2] stating that the deduction is limited to debts created by advances out of capital or out of income. It did not address the analogies raised by the Ninth Circuit Court of Appeals,[3] in which the court pointed out that a taxpayer similarly situated to the petitioner's position was arguably more like that of "a taxpayer who pays materialmen's liens on his house after the builder has defaulted. See Martin, 1962, 38 TC 188. . . . that of a guarantor who pays the creditor when the principal debtor defaults: Shirman v. Commissioner, 2 Cir., 1932, 60 F.2d 65; Putnam v. Commissioner, 1956, 352 U.S. 82, 77 S.C. 175, 1 L.Ed.2d 144; Iowa Southern

---

[2]Swenson v. Commissioner, 43 TC 897 (1964).

[3]Imeson v. Commission o Internal Revenue, 487 F.2d 319, at 320 (9th Cir. 1973).

Utilities v. United States, Ct.Cl. 1965, 348 F.2d 492,172 Ct.Cl. 21."

To date no court has properly addressed the true nature of the obligation to provide child support and/or alimony. In fact, by failing to do so the Fifth Circuit Court of Appeals violated its own pronouncement in Cotnam v. Commissioner of Internal Revenue, 263 F.2d 119,122 (5th Cir. 1959), citing United States v. Safety Car Heating and Lighting Co., 297 U.S. 88, 56 S.Ct. 353,80 L.Ed.500 (1936), in which it stated that "the nature of the transaction underlying the judgment, not the judgment itself, controls the tax effects. . . ." It is clear that the debt did not arise when the divorce decree and judgment was entered, that decree merely set out, defined, and limited Mr. Perry's legal obligations for support. The debt did not arise until Mr. Perry failed to satisfy those obligations as defined by the judgment, and when petitioner was forced to expend her own capital assets and after tax dollars to pay those obligations on his behalf. To blindly

analogize those actual payments to uncollectible, unpaid wages or salary is untenable. This conflict, which has far reaching ramifications for millions of tax payers across the country, and, as affirmed by the Fifth Circuit, allows the Internal Revenue Service to a windfall at the expense of the single parent. It can only be resolved definitively by this Court.

II. THE FIFTH CIRCUIT ERRED, AS A MATTER OF LAW, BY ITS CONSTRUCTION OF THE APPLICABLE PROVISIONS OF THE INTERNAL REVENUE CODE AND WITHOUT REGARD FOR THE INTENT OF CONGRESS.

The Fifth Circuit Courts of Appeal blindly followed the Swenson decision, supra, which treats support obligations as unpaid wages or salary. Swenson should be overruled for the following reasons:

1. The divorce decree or judgment merely defines and limits contractually the specific

obligations imposed as a matter of law on the supporting spouse. While the failure to pay those sums without the corresponding actual payments of support by the custodial parent may constitute a situation similar to unpaid wages or salary, the actual payment of the support obligations by the custodial parent is the creation of the debt and establishes the required "basis" for the deduction under the Internal Revenue Code.

2. With regards to alimony, the treatment of these support payments as "unpaid wages or salary" is a fiction that was created by Congress in 1942, when it transferred the tax liability from the paying spouse to the receiving spouse. These payments are not actually income to the receiving spouse, but are instead sums transferred to her as a conduit only for the payment of specific and individual support obligations such as food, clothing, shelter, etc.

3. While the support allocated in a divorce judgment is usually ear-marked in general terms

as being for the "support" of the children or spouse (i.e., food, clothing, shelter, etc.), the actual debts of the supporting spouse's legal obligation to provide such support arises as they are incurred by the children for specific items of support.

Therefore, petitioner is entitled to a deduction for the loss she sustained as a result of her ex-husband's failure to pay support payments under either Section 165 or Section 166 of the Internal Revenue Code.

A. Section 166

Prior to the divorce, Mr. Perry had the legal obligation to provide support for his spouse and children - to pay the landlord or mortgagee, the butcher, the baker, the grocer, the doctor, the druggist, etc. Upon separation and divorce, he still had those same obligations; however, his liability for those obligations was limited to the amounts stated in the agreement, which became a part of the judgment of divorce. Further, rather than make those payments directly, under the agreement,

petitioner was appointed to act as the disburser of the funds on his behalf to the landlord, the butcher, the baker, etc.

Mr. Perry could have agreed to continue to make direct payments to those persons providing food, shelter, clothing and education for his spouse and children (and in some cases the parties to a divorce agree to handle their family obligations in that manner); however, in the case before the court, it was agreed that the petitioner would be recipient of the funds necessary to fulfill Mr. Perry's legal obligations of support to his spouse and children, and she, in turn, had the fiduciary obligation to pay the creditors on his behalf. In Mandel v. Comm., 229 F.2d 328 (7th Cir. 1956), the court recognized the principle that the mother (custodial parent) was merely the conduit for proper disbursement of support payments.

As a practical matter, the custodial parent with whom the creditors deal on a daily basis, naturally look to the custodial parent

for payment for items for the support and maintenance. If she does not pay the rent, she and the children will be evicted. If she does not pay the gas and electricity, they will not have heat and lights.

The purpose of the judgment and agreement is to define for the present and future a mechanism for the payment of these obligations so the divorced parties can carry on their lives in an orderly fashion. It does not alter the basic obligation of the non-custodial parent to provide support for his spouse and children.

However, the moment the petitioner pays the rent, grocery bill, the utility bill, tuition, etc,, she succeeds to the rights of the creditors by subrogation to the extent of the payment made, subject to Mr. Perry's limit of liability as set out in the agreement and the judgment. La. Civil Code Article 2161 (1870). At that point in time, since Mr. Perry did not pay the support payments, petitioner had a separate and independent claim which could be

pursued by either going back to family court which rendered the judgment or by filing a civil suit on the subrogation action. Upon the making of these payments by petitioner, and because of his legal and contractual obligation of support, Mr. Perry became indebted unto her for specific debts and these debts exceeded $4,800.00 per year in each of the tax years in question. See also Pearlstein v. Mattes, 199 So. 151 (La. App. 1941). Therefore, petitioner has established all the elements necessary in order to be entitled to the maximum deduction for the tax years in question under Section 166 of the Internal Revenue Code. The debtor/creditor relationship is established both by virtue of the agreement/judgment and by virtue of legal subrogation. Iowa Southern Utilities Company v. United States, 348 F.2d 492 (Ct. Cl. 1965). The debts were worthless and uncollectible in each of the tax years in question, and her basis, the payment by her with after tax dollars of Mr. Perry's obligations, exceeded $4,800.00 per year. Imeson v. Commissioner, 487 F.2d 319 (9th

Cir. 1973) and cases cited therein.

B. Section 165

The obligation of support is more than merely paying a car note. Its essence is so serious (like the failure to report income), that the failure to meet that support obligation can result in imprisonment. When Mr. Perry received his pay check, he in effect was holding the support payments as a fiduciary. His failure to make those payments is a breach of his fiduciary duty to his spouse and children, and borders on a form of constructive conversion, embezzlement or theft. Therefore, when petitioner had to pay Mr. Perry's support obligations, she sustained a loss just as if someone entered into her house and had stolen the money out of her purse. Further, the loss she sustained is no different than if her automobile had been involved in an accident, was not insured, and she had to spend her after tax dollars to have it repaired. These are the types of casualties that Section 165 is intended to cover. This misuse of funds by Mr. Perry

caused petitioner a loss of $4,800.00 per year and that loss should qualify as a loss under Section 165 of the Internal Revenue Code. It certainly was a "casualty".

CONCLUSION

This Court should grant writs of certiorari for the following reasons:

1. To resolve the apparent conflict in legal reasoning between the Fifth Circuit Court of Appeals and the Ninth Circuit Court of Appeals, applicable to the issue before the Court;

2. To allow the petitioner and millions of other taxpayers similarly situated, their legal deduction under the Internal Revenue Code and prohibit the Internal Revenue Service from

receiving a windfall in situation, such as the petitioners, where the former spouse fails to pay child support and/or alimony payments.

Respectfully Submitted,

/s/ Carolyn Pratt Perry
CAROLYN PRATT PERRY,
Petitioner
Acadian Centre
Suite 420
2431 So. Acadian Thruway
Baton Rouge, Louisiana 70808
(504) 928-6898

90-1316

Supreme Court, U.S.
FILED
DEC 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CAROLYN PRATT PERRY,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Carolyn Pratt Perry,
Petitioner
Acadian Centre
Suite 420
2431 So. Acadian Thruway
Baton Rouge, LA 70808
(504) 928-6898
In Proper Person

APPENDICES

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 89-4845 and 89-4848

CAROLYN PRATT PERRY,

Petitioner - Appellant,

versus

COMMISSIONER INTERNAL REVENUE,

Respondent - Appellee.

Appeals from the Decisions of the
United States Tax Court

ON SUGGESTION FOR REHEARING EN BANC

(Opinion August 15, 5 Cir., 1990, 912 F.2d 1466)
(September 28, 1990)

Before THORNBERRY, JOHNSON, and SMITH, Circuit Judges

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor if it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ SAM JOHNSON
United States Circuit Judge
9-18-90

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 89-4845
89-4848

CAROLYN PRATT PERRY,
Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the Decisions of the United States Tax Court (TC No. 6507-83)

(August 15, 1990)

Before THORNBERRY, JOHNSON and SMITH, Circuit Judges.

PER CURIAM:[1]

Carolyn Pratt Perry appeals from decisions of the Tax Court affirming the Commissioner of

---

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Internal Revenue's determination of tax deficiencies. Finding no error, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Taxpayer Carolyn Perry (Perry), an attorney licensed to practice law in the State of Louisiana, brought these actions seeking a redetermination of deficiencies noticed by the Commissioner of Internal Revenue (the Commissioner) for the 1980, 1981, 1982, and 1984 tax years. After Perry and the Commissioner settled certain of their disputes, the following issues remained for determination by the Tax Court: 1) a "bad debt" loss affecting all four tax years occasioned by Perry's ex-husband's failure to pay court ordered child support and alimony, 2) Child care credit affecting the 1982 tax year for airfare to send Perry's children to their grandparents for summer vacation, 3) social security payments which Perry made, as an employer, for her children's babysitter that affect the 1982 tax year, and 4) taxes affecting the 1984 tax year on interest income which was

earned on funds which Perry claimed she held as "custodian" for her minor children.

The Tax Court, in separate opinions in the two cases, held in favor of the Commissioner on the bad debt, airfare and interest income issues. Perry, however, prevailed on the issue payments. Thereafter, Perry timely appealed the adverse determinations by the Tax Court; the commissioner, however, took no appeal.

II. DISCUSSION

A. Child Support and Alimony

On appeal, as in the Tax Court, Perry contends that she is entitled to a "bad debt" deduction under Section 166 of the Internal Revenue Code (IRC) for all four years that her ex-husband failed to make court ordered child support and alimony payments. Perry and her former husband divorced in 1975 in Georgia. As part of the property settlement and support agreement between the Perrys, Perry's ex-husband was ordered to pay Perry a total of $400.00 per month for the support of the couple's two

children (hereinafter referred to as the "paragraph two payments"). Additionally, the support agreement called for Perry's ex-husband to pay an additional amount -- up to $400.00 per month -- in alimony to Perry (hereinafter referred to as the "paragraph three payments").[2] In 1976, Perry's ex-husband advised Perry that he would not be making either the paragraph two or three payments. After pursuing her legal remedies in Georgia, the state of the divorce, and in Louisiana, Perry's state of residence, Perry recovered some, but not all, of the court ordered payments from her ex-husband.[3] In 1985, Perry and her ex-husband executed a "Continuing Guarantee and Agreement to Pay Support Obligation of Richard D. Perry" (the Guaranty Agreement) in which he promised to make payments

---

[2] The actual amount of the payment required of Perry's ex-husband under paragraph three was tied to the level of his net income.

[3] In 1985, Perry's ex-husband became current in his paragraph two payments after Perry had secured the second of two writs of fieri facias in Georgia on the paragraph two arrearages.

in accordance with the provisions of the original divorce decree.

For the tax years at issue, Perry claimed that she had expended more money to care for her children than she had received from her ex-husband and characterized those expenses as "bad debts" pursuant to Section 166 of the IRC. The Tax Court, concluding that Perry did not have a basis in the debt, sustained the Commissioner's deficiency determination with respect to Perry's claimed deductions. On Appeal, Perry assigns error to the Tax Court's conclusion that there was no basis in the debt.

In order to deduct a bad debt that is nonbusiness related, a taxpayer is obligated to satisfy certain requirements among which is that the debt be one in which the taxpayer has a basis. See Section 166(b). In **Swenson v. Commissioner**, 43 T.C. 897 (1964), the Tax Court stated that

> [i]t is well established that the deduction of a bad debt from gross income under the income tax provisions of the internal revenue statutes is limited to debts created by advances out of capital

> or out of income previously taxed or exempted, or, in other words, debts with regard to which the taxpayer has a basis. . . . Acting on this principle, we held in **Pearl A. Long**, 35 B.T.A. 479 [1937], aff'd. 96 F.2d 270, certiorari denied 305 U.S. 616, that uncollectible arrearages in payments ordered by a divorce court for the maintenance of taxpayer's divorced wife and of their children did not constitute a bad debt deductible from the wife's gross income.

Id. at 898-99 (citation omitted) (footnote omitted). Relying on **Swenson**, the Tax Court in the instant case concluded that Perry had established no basis in the debt. Perry's contentions notwithstanding, we find no error in that conclusion.

To the extent that Perry claims that the Guaranty Agreement provides a basis in her debt, her argument is misplaced. The Guaranty Agreement did not exist during any of the years at issue in this appeal. Therefore, Perry's ex-husband's default on his financial obligations could not have been made pursuant to the Guaranty Agreement during the years at issue. In further support of her contentions, Perry cites Section 1.166-9 of the Income Tax

Regulations as authority for the use of a guaranty as a basis for the nonbusiness bad debt deduction. The cited regulation, however, addresses guaranty agreements entered into by a taxpayer in the course of that taxpayer's trade or business or transactions entered into for profit. Because the Guaranty Agreement executed by Perry and her ex-husband in this case falls in neither category, Perry's reliance on the cited regulation is equally unavailing.[4]

B. Airfare Expenses

We next turn to Perry's contention that the Tax Court erred in affirming the Commissioner's determination of a deficiency as a result of Perry's attempt to claim child care credit for airfare to send Perry's children to stay with their grandparents. Perry asserts that during 1982, there were several times when her

---

[4] Insofar as Perry advances the argument that her ex-husband's arrearages amount to a "casualty" loss under Section 165 of the IRC, we reject her contentions. Since Perry raises this issue for the first time on appeal, this Court is not bound to consider her arguments in support thereof. See Pokress v. Commissioner, 234 F.2d 146 (5th Cir. 1956).

children's usual babysitter was unavailable. Consequently, Perry claims that the most economical solution was to send her children to their grandparents for custodial care. Perry argues that the cost of the airline tickets for her children's transportation to their grandparents' home in Shreveport, Louisiana, was inseparably tied to the care of the children because the children were placed in the custody of the superintendent of the flight.

Perry's argument, albeit ingenious, is unpersuasive. To the extent that Perry relies on **Zoltan v. Commissioner**, 79 T.C. 490 (1982), for the proposition that the cost of transporting the taxpayer's children to summer camp under applicable income tax regulations is deductible, her reliance is misplaced. In Zoltan, the Tax Court explicitly recognized that the cost of transporting a taxpayer's child to a facility where care was to be provided was not a deductible expense. **Zoltan** at 497-98. The Tax Court in the instant case did not err in sustaining the Commissioner's notice of

deficiency with respect to Perry's claimed child care credit for purchased airline tickets.

C. Interest Income

In her last assignment of error, Perry claims that the Tax Court erred in affirming the Commissioner's notice of deficiency regarding interest earned on funds which Perry contends she held as "custodian" for her minor children during the 1984 tax year. This issue arises from 1980 cash gifts from Perry's parents of $6,000.00 to Perry and $6,000.00 to each of Perry's two children. Upon receipt of their gifts, Perry commingled the funds and deposited the entire $18,000.00 in a Merrill Lynch Ready Asset account in her own name. From the date the funds were deposited in that account until 1985, Perry exercised complete control over the account and withdrew various amounts from time to time. Perry used the money for a variety of expenses including a trip to Europe, satisfaction of personal income tax obligations,

and various other unspecified purposes.[5]

In 1985, Perry liquidated the Merrill Lynch account, which, by that time, contained only $6,817.70. Perry thereafter purchased a Certificate of Deposit as custodian for the children. Ultimately, Perry prematurely redeemed the Certificate of Deposit, receiving, after the imposition of an early withdrawal penalty, $6,679.25. On that same day, Perry "borrowed" the entire $6,679.25 from her children and executed a "demand note" in that amount payable at twelve percent interest. Thereafter, in 1987, the Commissioner noticed a deficiency with respect to the interest earned on the above described funds for the 1984 tax year, having noticed similar deficiencies in earlier years.[6]

On appeal, Perry does not attack the merits

---

[5] Perry kept no records of how the money was spent or what, if any, portion was expended on behalf of her children.

[6] The Commissioner and Perry settled their differences with respect to the earlier deficiencies.

which underlie the ruling of the Tax Court sustaining the Commissioner's determination of the interest income for the 1984 tax year. Instead, Perry urges that because the Commissioner settled with Perry regarding the 1982 tax year, the Commissioner is now estopped from asserting the same claim with respect to the 1984 tax year. Again, Perry's argument is foreclosed by prior authority. In **United States v. Int'l Building Co.**, 345 U.S. 502 (1953), the Supreme Court held that where a taxpayer and the Commissioner stipulate to a finding of no deficiency with respect to certain tax years, collateral estoppel principles are generally inapplicable to litigation involving other tax years. The Supreme Court so held since it is virtually impossible to "tell whether the agreement of the parties was based on the merits or on some collateral consideration." Id.

The above recited rule, however, is not absolute. In **Commissioner v. Sunnen**, 333 U.S. 591, 599-600 (1948), the Supreme Court held that

> [collateral estoppel] must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.

In the instant case, the controlling facts changed from year to year. The funds were commingled and Perry, at times over the years in question, made substantial withdrawals and expenditures for her own benefit. During the 1984 tax year, Perry retained total control over the principal and the interest. As the Tax Court noted, if Perry had truly served as custodian of her children's funds, the note which she executed in 1985 would have been for a sum at least in the amount of $12,000.00 plus interest earned thereon from 1980 -- not the depleted sum of $6,679.25. Thus, in sum, we conclude that Perry has not borne her burden of proving that the Commissioner erred in his notice of deficiency with regard to the interest income at issue. See Welch v. Helvering, 290 U.S. 111 (1933).

III. CONCLUSION

The Tax Court did not err in disallowing Perry's claimed deduction for "bad debt" losses because of her ex-husband's failure to make court ordered support payments and in disallowing child care credit for airfare to send Perry's children to their grandparents' home. The Tax Court properly sustained the Commissioner's notice of deficiency with respect to Perry's tax liability on interest income which Perry received on commingled funds which Perry alleged to have held as custodian for her minor children. The decisions of the Tax Court are affirmed.

AFFIRMED

92 T. C. No. 28

UNITED STATES TAX COURT

CAROLYN PRATT PERRY, petitioner v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 6597-83, 14905-84, 15225-84.

Filed March 16, 1989.

Petitioner's ex-husband failed to make certain court-ordered payments in 1980, 1981, and 1982. Petitioner's expenditures for support of their minor children during each of these years exceeded that year's unpaid amount. Petitioner paid the airfare to send their children to stay with the children's grandparents; and she paid a babysitter's share of Social Security taxes as part of the babysitter's compensation.

Held: (1) Petitioner is not entitled to a bad debt deduction for any of the years because she has no basis in any of the debts. Swenson v. Commissioner, 43 T.C. 897 (1965), followed.

(2) Petitioner is not entitled to a child care credit for the airfare expenses. Sec.

1.44A-1(c)(3)(i), Income Tax Regs.; Zoltan v. Commissioner, 79 T.C. 490 (1982),

(3) Petitioner is entitled to a child care credit for paying the employee's share of Social Security taxes on behalf of a babysitter.

Carolyn Pratt Perry, pro se.

Janice Chenier Taylor, for the respondent.

CHABOT, Judge: Respondent determined deficiencies in Federal individual income tax and additions to tax under section 6651(a)(1)[1] (failure to file timely tax returns) against petitioner as follows:

Docket No.	Year	Deficiency	Additions to Tax Sec. 6651(a)(1)
6507-83	1980	$ 433	-0-
14905-84	1981	1,349	-0-
15225-84	1982	2,477	$362.25[2]

By amendment to answer, respondent asserts an increased deficiency for 1980 in the amount of

---

[1] Unless indicated otherwise, all section references are to sections of the Internal Revenue Code of 1954, as in effect for the years in issue.

[2] Respondent has conceded the Sec. 6651(a)(1) addition to tax.

$539.58, for a total deficiency in the amount of $972.58. This is based on disallowance of a deduction of $3,000 and is disputed. At trial, respondent also asserted that petitioner had a 1980 long-term capital gain of $156 that had not been taken into account; petitioner concedes the correctness of this additional adjustment.

These cases have been consolidated for trial, briefs, and opinion. After concessions by both parties, the issues for decision[3] are as follows:

(1) Whether petitioner was entitled to bad debt deductions under section 166 on account of arrearages in payments due from her ex-husband;

(2) Whether petitioner was entitled to a child care credit on account of transportation expenses paid for her children; and

(3) Whether petitioner was entitled to a child care credit on account of her payment of the employee's share of Social Security taxes on

---

[3] The adjustments to medical expense deductions are derivative, and depend on the settled issues and on our determination as to the bad debt deductions.

behalf of a babysitter.

FINDINGS OF FACT

Some of the facts have been stipulated; the stipulations and the stipulated exhibits are incorporated herein by this reference.

When the petitions were filed in the instant cases, petitioner resided in Baton Rouge, Louisiana.

Petitioner married Richard Donald James Perry (hereinafter sometimes referred to as "Perry") on November 26, 1966. At that time, petitioner was a chemist at Union Carbide Corporation in Tarrytown, New York; Perry was a marketing assistant manager for the Nestle Company, and attended night school.

In January 1967, Perry quit his job and became a full-time student at Iona College in New Rochelle, New York. Perry continued as a full-time student until he was graduated in June 1969, receiving a bachelor's degree in business administration. While Perry pursued his degree, petitioner continued working. During those 2-1/2 years, petitioner spent about $10,000 for

books, tuition, and other expenses allocable to Perry.

In mid-1969, Perry entered the Army. Petitioner's and Perry's first child, Elizabeth (hereinafter sometimes referred to as "Beth"), was born on April 28, 1970. Perry then served a tour in Vietnam. On his return, he, petitioner, and Beth moved to Atlanta, Georgia, where he became a marketing manager for Mead Corporation. Their second child, Leonard (hereinafter sometimes referred to as "Tad"), was born on May 18, 1972.

Petitioner and Perry were divorced on June 23, 1975, by judgment of the Superior Court of Fulton County, Georgia. The Georgia court's divorce decree (hereinafter sometimes referred to as "the divorce decree") incorporated a property settlement and support agreement between petitioner and Perry. The divorce decree granted custody of their minor children to petitioner.

Bad Debt Deduction

In paragraph 2 of the divorce decree[4], Perry

---

[4] To settle and discharge the husband's legal obligations to the children by reason of their marital status and family relationship, the husband shall make the following payments to the wife for the support, care, maintenance and education of the children:

(a) For the period commencing May 1, 1975, and continuing thereafter until said child marries, becomes eighteen (18) years of age, becomes self-supporting or dies, whichever event first occurs, the sum of Two Hundred Dollars ($200.00) per month for the support, care, maintenance and education of ELIZABETH PRATT PERRY, provided, however that notwithstanding the above provision said support shall continue for said child so long as she remains as a fulltime student in a four-year baccalaureate degree granting program;

(b) For the period commencing May 1, 1975, and continuing thereafter until said child marries, becomes eighteen (18) years of age, becomes self-supporting or dies, whichever event first occurs, the sum of Two Hundred Dollars ($200.00) per month for the support, care, maintenance and education of LEONARD KEEGAN PERRY, provided, however, that notwithstanding the above provisions said support shall continue for said child so long as he remains as a fulltime student in a four-year baccalaureate degree granting program.

All of the aforesaid payments shall be made by the fifth (5th) day of each month beginning in the month stated and continuing each successive month as provided in the above terms of payment, subject to the adjustments set forth below, but shall cease and terminate in the event of the husband's death.

was ordered to pay to petitioner a total of $400 per month ($200 for each child) "for the support, care maintenance and education of the children". (the payments so ordered are hereinafter sometimes referred to as "paragraph 2 payments".) In paragraph 3 of the divorce decree[5], Perry was ordered to pay an additional

---

[5] In addition to the payments to the wife for child support designated in paragraph two, the Husband shall make the following payments to the wife as alimony, for her proper support and maintenance, until she dies, until she remarries, until the husband dies or until May 1, 1991, whichever first occurs (provided, however, that the remarriage of the wife shall not terminate such alimony so long as a child remains under the age of 18):

> (a) In the event the husband shall realize in any one month a net income in excess of One Thousand Dollars ($1,000.00), to include any salary, wages, commissions, bonuses, and the like, reduced by the amount of F.I.C.A., federal and state taxes with-held (or an appropriate pro rata withholding for estimated tax payments) the husband shall pay Forty (40%) Percent of such excess, subject to a maximum amount of Four Hundred Dollars ($400.00) per month.
>
> (b) In Connection with the husband's performance of the obligations set forth above, the husband shall make available to the wife for her inspection copies of any original statements prepared by the husband's employer reflecting the husband's income for the preceding

(footnote continued)

amount of up to $400 per month, depending on the level of Perry's net income, as "alimony for [petitioner's] proper support and maintenance". (The payments so ordered are hereinafter sometimes referred to as "paragraph 3 payments".)[6]

Paragraph 11 and 12 of the divorce decree provides as follows:

> 11.
>
> The husband, so long as he makes the payments herein called for to the wife for her support and that of the children as the same fall due, and complies with his other obligations hereunder, he shall have the sole and exclusive right to claim the

---

(continued footnote from previous page)
calendar quarter beginning June 1, 1975, and the husband shall also make available to the wife for her inspection no later than March 15th of each year beginning March 15, 1976, copies of any and all "W-2" forms reflecting yearly income.

[6] Respondent has conceded (for purposes of this proceeding only) that Perry's income was of a sufficient amount that Perry would have been required to pay $400 per month to petitioner as paragraph 3 payments during 1980, 1981, and 1982.

said children as his dependents for federal and state income tax purposes.

12.

This Agreement is intended to provide for the full future obligations as between the parties hereto based on the present income and financial condition of the husband and the wife, and neither party hereto shall be barred from seeking a revision of the same under the provisions of Georgia Code Annotated Sections 30-220, et seq. This Agreement constitutes the entire understanding between the parties, and there are no representations or warranties other than expressly herein set forth. Except as provided herein, no modification or waiver of any of the terms hereof shall be valid unless in writing and signed by both parties. No waiver of any breach hereof or default hereunder shall be deemed a waiver of any subsequent breach or default of a same or similar nature.

In June of 1976, Perry informed petitioner that he would not make any of the payments he owed to petitioner under the divorce decree. At that time, petitioner was unemployed and attending school. Petitioner then began a long series of enforcement efforts. Petitioner had a complaint filed under the Uniform Reciprocal Enforcement of Support Act[7]. As a result, beginning in August of 1976, Perry began making payments of $250 per month. In February of 1977, Perry filed suit in Louisiana Family Court to have the $800 per month payments required under the divorce decree (paragraph 2 payments plus paragraph 3 payments) reduced. Petitioner, by reconventional demand, asked the Louisiana court to award her $14,000 for payments ($4,800 of "child support" and $9,200 of "alimony") in arrears from Perry as of April 1, 1977. On May 23, 1978, the Louisiana court

---

[7] The Uniform Reciprocal Enforcement of Support Act provides a procedure through which the custodial parent can gain interstate enforcement of child support. Ga. Code Ann. §§19-11-40 through 19-11-81 (1982); La. Rev. Stat. Ann. §13:1661-1698 (West 1983).

ordered Richard to pay to petitioner $6,450 "for child support as stipulated due * * *." The Louisiana court's judgment did not refer to (1) Perry's contention that his payment obligations should be reduced and (2) petitioner's reconventional demand for $9,200 of "alimony". The Louisiana court's judgment did "recognize and render executory" in Louisiana, the divorce decree that had been issued by the Georgia court.

In 1979, petitioner obtained a writ of fieri facias[8] from the Georgia court for $9,422.50 of arrearages in paragraph 2 payments due to that date. In 1985, she obtained another writ of fieri facias for $7,408 of arrearages in paragraph 2 payments due from 1979 through 1985. She did not seek writs of fieri facias for the arrearages in paragraph 3 payments because, pursuant to advice of legal counsel, she

---

[8] Under Georgia law, there is a procedure under which the court will issue a writ of fieri facias based on an affidavit by the custodial parent, for amounts due under an existing agreement for child support. Ga. Code Ann. §19-6-4 (1982).

believed that the fieri facias procedures were not available for the collection of payments labeled as alimony.

By the spring of 1985, Perry had become up-to-date in his paragraph 2 payments obligations. However, Perry has not made any paragraph 3 payments.

On her tax returns for 1980, 1981, and 1982, petitioner claimed dependency deductions for both Beth and Tad; respondent has not disallowed any of these dependency deductions.

On her 1980, 1981, and 1982 Federal income tax returns, petitioner claimed above-the-line deductions in the amounts of $3,000[9], $4,800[10],

---

[9] On her 1980 tax return, petitioner inadvertently omitted her Schedule D. On the Schedule D which she had prepared but failed to attach to the Form 1040, petitioner claimed a short-term capital loss of $4,800 (nonbusiness bad debt from the paragraph 3 payments arrearages for 1980) and reported a long-term capital gain of $156 (unrelated matter). On that Schedule D, petitioner netted the two items, but arrived at a loss of $4,643. Applying the deduction limit (Sec. 1211(b)), she deducted $3,000 in arriving at adjusted gross income for 1980 and showed $1,643 as available for short-term capital loss carryover treatment for 1981.

and $4,800[11], respectively, on account of the arrearages in paragraph 3 payments for those years. For 1982, petitioner reported an adjusted gross income of $29,607.

During each of the years 1980, 1981, and 1982, petitioner spent from her own funds more to support Beth and more to support Tad than she received from Perry for each of these children.

The petitions in the instant consolidated cases were filed on March 24, 1983, May 21, 1984, and May 23, 1984. On September 30, 1985, petitioner executed a document titled:

---

[10] On her 1981 tax return, petitioner properly attached her Schedule D. The only item on this schedule was the $4,800 short-term capital loss deduction. Petitioner ignored the $1,643 carryover from 1980. More to the point, she failed to fill out Part III of Schedule D, ignored the $3,000 deduction limit, and deducted $4,800 in arriving at adjusted gross income.

[11] On her 1982 tax return, petitioner properly attached her Schedule D. Here, too, the only item was the $4,800 short-term capital loss deduction. Again, petitioner ignored carryovers. This time, petitioner filled out part of Part III of the Schedule D, but stopped before the last line of that part and so she once again ignored the $3000 deduction limit. Again, she deducted $4,800 in arriving at adjusted gross income.

"Continuing Guarantee and Agreement to Pay Support Obligations of Richard D. Perry" (hereinafter sometimes referred to as "the Guarantee")[12] under which petitioner purported

---

[12] Continuing Guarantee and Agreemnt to Pay Support Obligations of Richard D. Perry

In consideration of the fact that Richard D. Perry (Debtor) is obligated to pay certain sums each year on a monthly basis up to a maximum amount of $800.00/month or $7200.00/year [sic] under that certain property settlement and support agreement entered into and made a part of the Judgment of Divorce rendered on June 23, 1975, in Fulton Superior Court, Georgia, a copy of which is attached hereto and incorporated herein as Exhibit "A";

Further, in consideration of the fact that it was my understanding of the agreement at that time, as well as now, that said sums were to be paid to me, Carolyn Pratt Perry, to provide for the support of the two children of the marriage, Elizabeth Pratt Perry ("Beth") and Leonard Keegan Perry, whose name has been legally changed to Leonard Pratt Perry ("Tad");

And further, in consideration of these children, their needs and the importance of providing them the best education possible:

I, Carolyn Pratt Perry, do hereby agree and give this continuing guarantee to the said Elizabeth Pratt Perry and Leonard Pratt Perry, for the payment in full of the indebtedness, liability hand/or obligation of Richard D. Perry for their support as set out in that Agreemnt and judgment (Exhibit "A"), as if the same due or owing by me in person, as I have done since June 23, 1975.

In recognition that the sums due by Richard D. Perry under paragraph 3(a) of said agreement (footnote continued)

to guarantee payment to Beth and Tad of the payments due from Perry under the divorce decree. The Guarantee was to be retroactive to June 23, 1975.

Child Care Credit

During 1980 through 1982, petitioner was employed as an attorney on a full-time basis. Beth and Tad came home from school about 3 p.m., and petitioner did not usually get home from work until about 7 p.m. Because of her employment, petitioner found it necessary to secure day-care services for Beth and Tad.

(continued footnote from previous page)
(Exhibit "A") were intended to be paid to me for the support of Elizabeth Pratt Perry and Leonard Pratt Perry, I agree to pay on behalf of the full amount of any indebtedness, obligation, liability, or sums of money that might become due from said Richard D. Perry under paragraphs 2 and 3 or any other provisions of said agreement, where said sums were or are intended for the support and welfare of Elizabeth Pratt Perry and/or Leonard Pratt Perry.

Further, this continuing guarantee and agreement to pay the aforementioned support obligations and debts of Richard D. Perry is retroactive to June 23, 1975.

IN FAITH WHEREOF, I have signed my name this 30th day of September, 1985.

/s/ Carolyn Pratt Perry
Carolyn Pratt Perry

Among the babysitters petitioner hired for Beth and Tad's day-care was Verna Crawford (hereinafter sometimes referred to as "Crawford").

Petitioner paid Crawford about $3 an hour, and also agreed to pay Crawford's share of Social Security taxes as part of Crawford's compensation for babysitting. During 1982, petitioner paid the employee's portion of Social Security taxes on behalf of Crawford.

During 1982, petitioner paid for airfare to send Beth and Tad to stay with their grandparents in Shreveport, Louisiana, during school holidays, instead of hiring a babysitter. If petitioner had hired a babysitter for those time periods, then the babysitter would have cost more than the airfare.

OPINION

I. Bad Debt Deduction

Respondent contends that petitioner is not entitled to bad debt deductions on account of the arrearages of Perry's paragraph 3 payments because: (1) petitioner did not establish a

basis in any debt; (2) petitioner did not establish the worthlessness of her right to the paragraph 3 payments; and (3) the nonpayment of the paragraph 3 payments does not fall within the definition of a capital asset to give rise to a capital loss deduction. Alternatively, respondent maintains that, if petitioner is entitled to bad debt deductions, then the amount should be less than that claimed by petitioner, in order to prevent overlapping deductions.

Petitioner maintains that she has proven all the elements necessary to show the existence, amount, basis, and worthlessness of a debt for 1980, 1981, and 1982.

We agree with respondent that petitioner does not have a basis in the debt.

In order to deduct a nonbusiness bad debt (§ 166(a) and (d))[13], the taxpayer must show[14] that

---

[13] Subsections (a) and (d) of Section 166 provide, in pertinent part, as follows:

SEC. 166. BAD DEBTS.
(a) General Rule. --
(1) Wholly worthless debts.--There shall be allowed as a deduction any debt which becomes
(footnote continued)

a number of requirements have been satisfied. The requirement we examine in the instant case is that the debt be one in which petitioner has a basis (Sec. 166 (b)).[15]

(continued footnote from previous page)
worthless within the taxable year.

* * *

(d) Nonbusiness Debts.--

(1) General rule.--In the case of a taxpayer other than a corporation--

(A) subsections (a) and (c) shall not apply to any nonbusiness debt; and

(B) where any nonbusiness debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 1 year.

[The subsequent amendment of sec. 166(d) by sec. 1001(b)(1) of the Deficit Reduction Act of 1984, Pub. L. 98-369, 98 Stat 494, 1011, does not affect the instant cases.]

[14] Petitioner has the burden of proof as to 1981 and 1982. However, since respondent first disallowed the 1980 deduction in his amendment to answer, respondent has the burden of proof on this issue as to 1980. Rule 142(a); Reiff v. Commissioner, 77 T.C. 1169, 1173 (1981).

Unless indicated otherwise, all Rule references are to the Tax Court Rules of Practice & Procedure.

[15]

SEC. 166 BAD DEBTS.

* * *

(B) Amount of Deduction.--For purposes of (footnote continued)

A legally enforceable divorce decree set forth Perry's obligations to make payments to petitioner. These obligations were not contingent on any expenditure by petitioner. During the years in issue, Perry was obligated to make paragraph 3 payments of $400 per month (see n.5, supra), regardless of whether petitioner spent little, much, or nothing at all on child support. Similarly, petitioner's expenditures were independent of Perry's court-ordered payments, and neither created nor affected the amount of the debt that Perry owed to petitioner.

When faced with this situation in Swenson v. Commissioner, 43 T.C. 897 (1965), we held that in such a situation the taxpayer did not have a basis in the debt, and so no deduction was allowable under section 166. Petitioner has not presented any argument which would lead us to

---

(continued footnote from previous page)
subsection (a), the basis for determining the amount of the deduction for any bad debt shall be the adjusted basis provided in section 1011 for determining the loss from the sale or other disposition of property.

distinguish or overrule Swenson.

We conclude that petitioner had no basis in the arrearages in paragraph 3 payments, and is therefore not entitled to a bad debt deduction.

Petitioner raises several arguments to support her contention that she has a basis in the debt.

Petitioner argues that the Guarantee provides a basis in the debt from Perry. The Guarantee did not exist during any of the years in issue; it is petitioner's attempt to create post-hoc "facts". No payments could have been made during any of those years under the Guarantee. In paying for the support of Beth and Tad, petitioner was merely satisfying her own obligations to her own children.

As the mother of her children, petitioner was already effectively the guarantor of their support. Under Georgia law (Ga. Code Ann. §19-7-2 (1982)), "the duty of parents to support their children is joint and several, and does not cease upon separation or divorce of the parents." Collins v. Collins, 172 Ga. App. 748,

324 S.E.2d 475,476 (1984). Under Louisiana law (La. Civ. Code Ann. art. 227 (1952)), the obligation to support one's children "continues after separation or divorce, and applies to both mothers and fathers." Marcus v. Burnett, 264 So.2d 737,739 (La. App. 1972), affd. on this issue and modified on another issue 282 So.2d 122 (La. 1973). Payment made on one's own obligation does not give rise to a bad debt deduction. Dreyfuss v. Commissioner, 140 F.2d 922 (CA5 1944), affg. a Memorandum Opinion of this Court dated Feb. 26, 1943; Estate of Schwehm v. Commissioner, 17 T.C. 1435 (1952). Petitioner acquired no basis in Perry's support obligation from (1) the mere execution of a document restating an obligation which was already hers or (2) the payment of support for her children.

Petitioner cites section 1.166-9, Income Tax Regs., as authority for the use of a guaranty as a basis for the nonbusiness bad debt deduction. However, that regulation deals with agreements entered into by a taxpayer in the course of that

taxpayer's trade or business (se. 1.166-9(a), Income Tax Regs.) or transactions entered into for profit (se. 1.166-9(b), Income Tax Regs.). The guarantee shows, on its face, that petitioner entered into it in order to assure her children that their mother would provide for them even if their father did not. This motivation has nothing to do with petitioner's trade or business or her desire for profit. The cited regulation does not support petitioner's claim in the instant cases.

Petitioner brings to our attention statements from the Court of Appeals' opinion in Imeson v. Commissioner, 487 F.2d 319 (CA9 1973), affg. a Memorandum Opinion of this Court.[16] In Imeson, the Court of Appeals' opinion notes our position in Swenson; it then suggests possible analogies to the position of "a taxpayer who pays materialmen's liens on his house after the builder has defaulted" or "a guarantor who pays the creditor when the principal debtor defaults"

---

[16] T.C. Memo. 1969-180

(487 F.2d at 320), in which events a bad debt deduction may be allowable. That opinion also suggests analogies to the treatment of "uncollectible unpaid wages or salary" or the situation where a "taxpayer wife * * * who [pays] her and her husband's joint income tax liability" (ibid.), in which events a bad debt deduction is not allowable. After suggesting the existence of a problem, the Imeson opinion specifically states that "We do not resolve these questions" (ibid.).

We conclude that the materialmen's lien and guarantor analogies only serve to illustrate the shortcomings in petitioner's case. In the materialmen's lien and guarantor situations, the taxpayer's role as creditor would have arisen only when and to the extent that the taxpayer paid the original debt. In the instant cases, any debt that Perry owed to petitioner arose, and was determined as to amount, without regard to petitioner's expenditures.

We conclude that the Guarantee did not provide petitioner with a basis in the support

obligations.

Petitioner also argues that her financing of Perry's education[17] was an investment in his earning potential, that the paragraph 3 payments were intended to be the return on her investment in Perry (to the extent that they were not intended to be child support), and that when those payments became uncollectible, she incurred a capital loss. Petitioner's argument, in essence, is that by financially supporting Perry during 2-1/2 years of their 8-1/2 year marriage, she obtained a basis in the

---

[17] Petitioner maintains that she has shown $12,375 of such expenditures; we have found "about $10,000". The difference arises thusly. Petitioner testified, and we have accepted, that about half of her earnings were spent on Perry's schooling. Petitioner testified as to the amounts for 1967 and 1968, and we have accepted her testimony. For 1969, petitioner has included half of her earnings for the entire year. However, we have accepted petitioner's testimony that Perry was graduated at the end of June 1969 and thereupon entered the Army. Thus, accepting petitioner's testimony, she spent half of her earnings on Perry's schooling for only half of 1969, and thus only one-fourth of her 1969 earnings were spent on Perry's schooling. This difference as to 1969 accounts for the difference between petitioner's contention and our finding of fact.

debt arising from the divorce decree. We do not agree.

Perry's obligation to make the paragraph 3 payments arose from the marital relationship and was defined by the divorce court. Petitioner's support of Perry during their marriage may well have enhanced his earning potential, but it cannot be said that petitioner supported Perry in order to acquire a right of action against him upon their subsequent divorce. Swenson v. Commissioner, 43 T.C. at 899. The amounts that petitioner spent to help educate her husband were no more than personal expenses (see sec. 262) that do not provide her a basis in a debt.

A purported loan between family members is always subject to close scrutiny. Caligiuri v. Commissioner, 549 F.2d 1155,1157 (CA8 1977), affg. a Memorandum Opinion of this Court[18]; Estate of Reynolds v. Commissioner, 55 T.C. 172,201 (1970). the same is true as to a purported investment. The presumption, for tax

---

[18] T.C. Memo. 1975-319.

purposes at least, is that a transfer between family members is a gift. Estate of Reynolds v. Commissioner, 55 T.C. at 201 and cases there cited. If there ever was a written agreement between petitioner and Perry, then it would be petitioner who would be expected to produce it. If Perry ever had made payments to petitioner to evidence an obligation to repay petitioner's investment, then it would be petitioner who could show such payments. Petitioner testified and produced checks and other records. Petitioner did not testify or produce any evidence regarding Perry's obligation to repay any of the money that petitioner spent. See Wichita Terminal Elevator Co. v. Commissioner, 6 T.C. 1158, 1165 (1946), affd. 162 F.2d 513 (CA10 1947). From this we conclude that petitioner's expenditures in 1967 through 1969 did not give rise to a debt from Perry to her.

The divorce decree deals at length in paragraph 8 with "The property jointly and/or severally held by the parties" and specifies dispositions with great particularity. There is

no reference in paragraph 8 to Perry's debt to petitioner. On the other hand, paragraph 9 specifically provides that Perry "will assume responsibility for all obligations and debts of the parties which accrued prior to January 1, 1975". Paragraph 3 (see n.5, supra) deals, by its terms, with "payments to the wife [petitioner] as alimony, for her proper support and maintenance". Paragraph 3 obligations are separate from property divisions and preexisting liabilities of paragraphs 8 and 9. Paragraph 12 provides that "This Agreement constitutes the entire understanding between the parties, and there are no representations or warranties other than expressly herein set forth." From this, we conclude that the divorce decree did not embody, in the paragraph 3 payments, any obligation as to which petitioner's 1967-1969 expenditures furnished a basis.

We conclude that petitioner had no basis in Perry's support obligations for the years in issue, and consequently that petitioner is not

entitled to bad debt deductions for the years in issue.

Petitioner insists that she ought to be allowed to deduct the shortfall in Perry's support payment obligations. If this were to be viewed as an appeal to public policy, i.e., the public failed to see to it that Perry satisfied his legal obligations and so the public ought to make up for this to some extent by reducing petitioner's tax obligations, then we have two responses.

Firstly, the statute for the years in issue does not embody that policy; to get that policy into the law, petitioner should go to the Congress, in which has been "vested" "All legislative Powers herein granted". United States Constitution, Art. 1, Sec. 1.

Secondly, since the tax benefit of such a deduction relates directly to the taxpayer's marginal tax bracket, it would appear that this claimed public policy would provide the greatest relief to those who have the greatest amount of other income and little or no relief to those

who truly depended on the fulfillment of the support obligations. The Congress, of course, may enact any public policy it chooses (unless otherwise limited by the Constitution), but the policy that would be advanced by allowing such a deduction may fairly be viewed as topsy-turvy.

In any even, this Court will not so legislate in the guise of filling in gaps in the statute, or whatever other judicial power it is that petitioner would have us exercise.

We hold for respondent on this issue.

II. Child Care Credit[19]

---

[19] In her opening brief, petitioner states as follows:

> The only remaining issues [sic] to be resolved by the Court is the allowance of the bad debt deduction pursuant to Section 166(d) as a result of the nonpayment of child support payments by the former husband of petitioner.

Petitioner's opening brief did not discuss the child care credit issues at all; all of her analysis on brief on the child care credit issues was in her answering brief. As a result, respondent's counsel was deprived of the opportunity to respond to petitioner's exposition of her position on this issue. In our analysis, we have taken into account that respondent's failure to controvert petitioner's (footnote continued)

In the case of a taxpayer who maintains a household which includes as a member one or more "qualifying individuals", section 44A(a) allows as a credit an amount equal to the "applicable percentage" (in the instant cases 20 percent) of the "employment-related expenses"[20] paid by the

---

(footnote continued from previous page)
contentions was not the result of any shortfall in respondent's position or its presentation. We considered whether we should deem petitioner to have conceded these issues. We concluded that, in the circumstances of these cases, justice would not be served by such deemed concessions.

[20] Sec. 44A(c)(2) provides as follows:

SEC. 44A. EXPENSES FOR HOUSEHOLD AND DEPENDENT CARE SERVICES NECESSARY FOR GAINFUL EMPLOYMENT

* * *

(c) Definitions of Qualifying Individual and Employment-Related Expenses.--For purposes of this section--

* * *

(2) Employment-related expenses.--

(A) In general.-- The term "employment-related expenses" means amounts paid for the following expenses, but only if such expenses are incurred to enable the taxpayer to be gainfully employed for any period for which there are 1 or more qualifying individuals with respect to the taxpayer:

(i) expenses for household services, and

(ii) expenses for the care of

(footnote continued)

taxpayer during the taxable year.

Respondent does not question that Beth and Tad were "qualifying individuals" within the meaning of section 44A(c)(1).

A. Transportation Expenses

Respondent does not dispute that the trips to Shreveport were for the dominant purpose of assuring Beth's and Tad's well-being and to permit petitioner to be gainfully employed, or that petitioner paid the amounts for which she claimed the child care credit.[21] Rather,

---

(continued footnote from previous page)
a qualifying individual.

[Pub. L. 98-369, effective for tax years beginning after Dec. 31, 1983, revised and relocated the "child care" credit. The text of sec. 44A(c)(2)(A) now appears as part of sec. 21(b)(2)(A).]

[21] On brief, petitioner states that she paid $331.50 on airfare for the children's trips to Shreveport. On brief, respondent states that petitioner spent $217.50 for this purpose. At trial, petitioner and respondent's counsel indicated that they were in agreement as to the amounts of the expenditures on this point and disagreed only as to the qualifying status. The Court's impression was that the expenditures were those shown on Exhibit 19 as $103.75, $65.00, $48.75, and $124.00--totalling $341.50. This matter is to be resolved in the computation under Rule 155.

respondent contends that the airfare is disqualified from being an "employment-related expense", within the meaning of section 44A by section 1.44A-1(c)(3), Income Tax Regs.

Petitioner contends that she sent the children to their grandparents in Shreveport during certain school holiday periods because (1) her regular babysitter was not available at those times and (2) the airfare was less expensive than it would have been to hire babysitters for those periods. (This is because petitioner would have had to pay for care for about 11 hours per day during those periods, while on regular school days she merely had to pay for sitters for the afternoons.) Also, petitioner contends that the airline cabin attendants provided care to the children during their trips to Shreveport. Petitioner relies on our opinion in Zoltan v. Commissioner, 79 T.C. 490 (1982), as authority for treating the air travel cost as employment-related expenses.

We agree with respondent.

In pertinent part, section 44A(c) defines

"employment-related expense" as either expenses for household services, or expenses for the care of a qualifying individual. Since none of the disputed expenses constitutes household expenses within the meaning of section 44A(c)(2)(i), the issue for our consideration is whether the airfare expenses were incurred for the "care" of petitioner's children within the meaning of section 44A(c)(2)(ii).

When the characterization of an expense is challenged under section 44A(c)(2)(A)(ii), the issue is resolved by reference to the specific facts at hand. Sec. 1.44A-1(c)(1)(i), Income Tax Regs.; Zoltan v. Commissioner, 79 T.C. at 494.[22]

---

[22] As we noted (n.20, supra), the child care credit now appears as sec. 21. Sec. 10101(a) of the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100-203, 101 Stat. 1330, 1330-384) amended sec. 21(b)(2)(A) to provide that, for taxable years beginning after 1987, overnight camp expenses do not qualify as "employment-related expenses" for purposes of the child care credit. SEc. 21(b)(2)(A), as amended, statutorily overrides that part of Zoltan v. Commissioner, 79 T.C. 490 (1982), which allowed a credit for the taxpayer's sending her son to summer camp. The part of Zoltan with which we deal was not so overruled.

In Zoltan, we dealt with the transportation expenses question as follows (79 T.C. at 497-498):

> Expenses incurred for transportation are subject to the disqualification provisions of section 1.44A-1(c)(3)(i), Income Tax Regs., which in pertinent part provides:
>
> > Expenses incurred for transportation of a qualifying individual * * * between the taxpayer's household and a place outside the taxpayer's household where services for the care of the qualifying individual are provided are not incurred for the care of a qualifying individual.
>
> We are of the opinion that the expenses incurred for the transportation of petitioner's son to Washington are not disqualified by this language. The cost of transportation from petitioner's home

to the place of departure is the type of expense that this language excludes. The care of Paul Zoltan commenced at that point. The transportation by bus to Washington began after petitioner's son was placed under the care of the supervisors of the expedition. This transportation was inseparably tied to that care and does not fit within the disallowance provisions of section 1.44A-1(c)(4), Income Tax Regs.[14] [Emphasis Added]

[14] The type of expenses that the language of se. 1.44A-1(c)(3)(i), Income Tax Regs., is designed to disallow is exemplified by the expenses incurred by petitioner in transporting her son to camp. In that case, her son was not released into the care of the service providers until the destination was reached. See Warner v. Commissioner, 69 T.C., 995, 997 (1978).

The transportation expenses in the instant

cases fall on the disallowance side of the line we drew in Zoltan. Petitioner acknowledges on answering brief that the children were cared for on the flights by the cabin attendants. There is nothing in the record to indicate that the cabin attendants were under the direction of petitioner's parents (the services providers in the instant case). Accordingly, for reasons explained in Warner v. Commissioner, 69 T.C. 995 (1978), and Zoltan, the regulation precludes us from treating the transportation expenses as employment-related expenses.

We hold for respondent on this issue.

B. Employee Social Security Payments.

In 1982, petitioner paid Crawford's wages and both the employer's and employee's share of Social Security taxes resulting from Crawford's babysitting work. Petitioner claimed a child care credit for 1982 for all of those amounts. Respondent, after concessions, disputes only petitioner's entitlement to a child care credit for paying Crawford's share of Social Security taxes imposed by section 3101. Respondent

concedes that petitioner paid the amounts for which she claimed the child care credit.[23]

We agree with petitioner.

Petitioner agreed to, and did, pay wages to Crawford. Petitioner agreed to, and did, pay Crawford's share of Social Security taxes to respondent. Petitioner's payment of Crawford's tax obligation is compensation to Crawford, just as the paid wages are compensation to Crawford. Old Colony Tr. Co. v. Commissioner, 279 U.S. 716, 729-730 (1929). To paraphrase section 44A, petitioner's payment of Crawford's portion of Social Security taxes, as part of Crawford's

---

[23] On brief, both sides state that petitioner paid $445.94 for Crawford's employee portion of Social Security taxes. At trial, petitioner testified that her Social Security taxes payments on account of Crawford were embodied in Exhibit 19's listing of four checks in the amounts of $105.48, $383.09, $7.91, and $127.64-- totalling $624.12. Petitioner testified that these checks were for the sum of her employer's share and Crawford's employee's share. At the trial, petitioner and respondent's counsel indicated that half the sum of these four checks had been allowed by respondent and that only half the sum remained in dispute. Half the sum is only $312.06, not $445.94. This matter is to be resolved in the computation under Rule 155.

compensation for caring for Beth and Tad, constitutes amounts paid for the care of qualifying individuals.

The fact that Crawford could not deduct those amounts as taxes (secs. 275(a)(1)(A), and 164; Zwiener v. Commissioner, 743 F.2d 273, 276 (CA5 1984), affg. a Memorandum Opinion of this Court[24]) does not affect the treatment of this item as compensation to Crawford (see sec. 1.164-2(f), Income Tax Regs.).

Apparently this is a matter of first impression. Perhaps it was not controverted before because the answer seemed to be so clear. The parties insisted on disputing it now, so we take the trouble to state the obvious.

We hold for petitioner on this issue.

To take account of the parties' settlements of many of the adjustments, our determinations on the issues for decision, and the matters

---

[24] T.C. Memo. 1983-659.

described in notes 21 and 23, supra,

Decisions will be entered under Rule 155.

UNITED STATES TAX COURT

CAROLYN PRATT PERRY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 6507-83

DECISION

Pursuant to the opinion of the Court filed March 16, 1989, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1980 in the amount of $636.40.

/s/ Hebert L.Chabot
JUDGE

Entered: October 4, 1989

Served: October 4, 1989

UNITED STATES TAX COURT

CAROLYN PRATT PERRY,	)	
	)	
Petitioner	)	
	)	
v.	)	Docket No.
	)	14905-84
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent.	)	

DECISION

Pursuant to the opinion of the Court filed March 16, 1989, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1981 in the amount of $955.08.

/s/ Hebert L. Chabot
JUDGE

Entered: October 4, 1989

Served: October 4, 1989

UNITED STATES TAX COURT

CAROLYN PRATT PERRY, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 15225-84

DECISION

Pursuant to the opinion of the Court filed March 16, 1989 and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1982 in the amount of $1,044.88, and

That there is no addition to tax from the petitioner for the taxable year 1982, under the provisions of I.R.C. §6651(a)(1).

/s/ Henry L. Chabot
JUDGE

Entered: October 4, 1989

Served: October 4, 1989

UNITED STATES TAX COURT

CAROLYN PRATT PERRY, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 13549-87

PARTIAL STIPULATION TO BE BOUND

THE PARTIES hereto hereby stipulate and agree to be bound as follows:

1. The case at Docket No. 13549-87 is presently scheduled to be heard at the trial session in New Orleans, Louisiana beginning on May 9, 1988.

2. Petitioner in Docket Nos. 6507-83, 14905-84, and 15225-84 is the same as the petitioner in Docket No. 13549-87.

3. The common issue in all these cases is a bad debt loss in an amount of $3,600.00 claimed by petitioner. This bad debt loss pertains to uncollected and uncollectible support payments from petitioner's former husband.

4. The cases at Docket Nos. 6507-83, 14905-

84, and 15225-84, which involve this issue were tried before Judge Chabot in New Orleans, Louisiana on October 8, 1985, and involved petitioner's taxable years 1980, 1981, and 1982.

5. An opinion has not been rendered in Perry v. Commissioner, T.C. Docket Nos. 6507-83, 14905-84, 15225-84 as of the date of this Stipulation.

6. As in this case, respondent had not raised the issue of the bad debt loss in its statutory notice of deficiency for the taxable year 1980, which was tried at Docket No. 6507-83. Respondent asserted its determination with regard to this issue in an Amendment To Answer it filed on January 22, 1984 in Docket No. 6507-83.

7. Pursuant to T.C. Rule 142(a) respondent has the burden of proof with respect to this new matter for the years 1980 and 1984.

8. Petitioner spent more than $5,000.00 in legitimate and recognized expenses for each of her children during 1984.

9. Therefore the parties agree to be bound

as follows:

a. Petitioner and respondent agree to be bound in all respects by the opinion to be rendered in T.C. Docket No. 6507-83 for the year 1980 regarding the bad debt loss claimed by petitioner with each reserving his right to appeal the decision(s).

WILLIAM F. NELSON
Chief Counsel
Internal Revenue Service

By: /s/ Louis John Zeller, Jr.
LOUIS JOHN ZELLER, JR.
Assistant District Counsel
P.O. Box 30509
New Orleans, LA 70190

/s/ CAROLYN PRATT PERRY
CAROLYN PRATT PERRY
Petitioner
329 St. Ferdinand
Baton Rouge, Louisiana 70802

May 10, 1988
Date

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

CAROLYN PRATT PERRY,

Petitioner

v. Docket No.

COMMISSIONER OF INTERNAL REVENUE, 13549-87

Respondent.

O R D E R

For cause appearing to the Court, it is

ORDERED that this case is assigned to Judge Herbert L. Chabot for trial or other disposition.

/s/ Arthur L. Niles, III JW
CHIEF JUDGE2

Dated: Washington, D. C.

June 29, 1988

Served: June 30, 1988

UNITED STATES TAX COURT

CAROLYN PRATT PERRY, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent	)	Docket No. 13549-87

DECISION

Pursuant to the opinion of the Court filed March 16, 1989 and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1984 in the amount of $1,192.00; and

That there is an addition to tax due from the petitioner for the taxable year 1984, under the provisions of I.R.C. § 6653(a)(1), in the amount of $59.60; and

That there is an addition to tax due from the petitioner for the taxable year 1984, under the provisions of I.R.C. § 6653(a)(2), in the amount

of 50% of the interest due on $244.00.

/s/ Herbert L. Chabot
JUDGE

Entered: October 4, 1989

Served: October 4, 1989

CAROLYN ELIZABETH PRATT PERRY	*	FULTON SUPERIOR COURT
	*	
VERSUS	*	
	*	CASE NO. C-1644
RICHARD DONALD JAMES PERRY	*	

FINAL JUDGMENT AND DECREE

Upon consideration of this case by the Court (no jury trial being demanded) from evidence submitted as provided by law, it is the judgment of the Court that a total divorce be and the same is hereby granted, that is to say a divorce a vinculo matrimonii, between the parties to the above stated case, upon legal principles.

The plaintiff herein shall have the right to remarry, the defendant herein shall have the right to remarry.

The agreement between the parties attached hereto as Exhibit "A" is hereby incorporated as part of the instant Final Judgment and Decree, and the parties are ordered to abide by the terms of the agreement effective May 1, 1975.

The costs of these proceedings are taxed against the Defendant.

Decree entered this 23 day of June, 1975.

/s/ [Illegible Signature]
JUDGE SUPERIOR COURT,
ATLANTA CIRCUIT

Filed in Office

June 23, 1975

/s/[Illegible Signature]
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

DKT. NO. 6507-83
14905-84
15225-84

EXH. 7-G

STATE OF GEORGIA

COUNTY OF FULTON

THIS AGREEMENT, made and entered into this 1st day of May, 1975, by and between CAROLYN ELIZABETH PRATT PERRY, hereinafter referred to as the "Wife", and RICHARD DONALD JAMES PERRY, hereinafter referred to as the "Husband":

W I T N E S S E T H:

WHEREAS, said parties hereto are husband and wife, having been married on the 26th day of November, 1966; and

WHEREAS, there are two children of said marriage, to wit: ELIZABETH PRATT PERRY, born on April 28, 1970; and LEONARD KEEGAN PERRY, born on May 18, 1972; and

WHEREAS, on or about November 9, 1974, the parties hereto separated and, since said date, have remained and are now living in a bona fide state of separation; and

WHEREAS, the wife did file suit for divorce in the Superior Court of Fulton County on or

about November 15, 1974; and

WHEREAS, the parties hereto desire to settle between themselves all questions relating to the permanent support of said wife and children, permanent custody of said children and rights of visitation, property rights and other matters existing by and between the parties hereto and/or their estates;

NOW, THEREFORE, in consideration of the premises and mutual undertakings herein contained, the parties do hereby agree and stipulate as follows:

1.

The parties shall continue to live separate and apart and each shall be free from the interference, molestation, authority and control, direct or indirect, by the other as fully as if sole and unmarried.

2.

To settle and discharge the husband's legal obligations to the children by reason of their marital status and family relationship, the husband shall make the following payments to

the wife for the support, care, maintenance and education of the children:

(a) For the period commencing May 1, 1975, and continuing thereafter until said child marries, becomes eighteen (18) years of age, becomes self-supporting or dies, whichever event first occurs, the sum of Two Hundred Dollars ($200.00) per month for the support, care, maintenance and education of ELIZABETH PRATT PERRY, provided, however, that notwithstanding the above provision said support shall continue for said child so long as she remains as a fulltime student in a four-year baccalaureate degree granting program;

(b) For the period commencing May 1, 1975, and continuing thereafter until said child marries, becomes eighteen (18) years of age, becomes self-supporting or dies, whichever event first occurs, the sum of Two Hundred Dollars ($200.00) per month for the support, care, maintenance and

education of LEONARD KEEGAN PERRY, provided, however, that notwithstanding the above provision said support shall continue for said child so long as he remains as a fulltime student in a four-year baccalaureate degree granting program.

All of the aforesaid payments shall be made by the fifth (5th) day of each month beginning in the month stated and continuing each successive month as provided in the above terms of payment, subject to the adjustments set forth below, but shall cease and terminate in the event of the husband's death.

3.

In addition to the payments to the wife for child support designated in paragraph two, the Husband shall make the following payments to the wife as alimony, for her proper support and maintenance, until she dies, until she remarries, until the husband dies or until May 1, 1991, whichever first occurs (provided, however, that the remarriage of the wife shall

not terminate such alimony so long as a child remains under the age of 18):

(a) In the event the husband shall realize in any one month a net income in excess of One Thousand Dollars ($1,000.00), to include any salary, wages, commissions, bonuses, and the like, reduced by the amount of F.I.C.A., federal and state taxes with-held (or an appropriate pro rata withholding for estimated tax payments) the husband shall pay Forty (40%) Percent of such excess, subject to a maximum amount of Four Hundred Dollars ($400.00) per month.

(b) In connection with the husband's performance of the obligations set forth above, the husband shall make available to the wife for her inspection copies of any original statements prepared by the husband's employer reflecting the husband's income for the preceding calendar quarter beginning June 1, 1975, and the husband shall also make available

to the wife for her inspection no later than March 15th of each year beginning March 15, 1976, copies of any and all "W-2" forms reflecting yearly income.

4.

In addition to the sums hereinabove provided for the support of the children, the husband shall pay one-half of the total expenses incurred by each child for the books, tuition, fees, and room and board to secure a four-year college education so long as the husband shall have approved a college to which the child has been admitted; in the event the husband does not approve of a college to which the child has gained admission, then in such event the husband shall pay a maximum of Two Thousand Dollars ($2,000.00) per child per academic year towards the aforesaid expenses.

5.

In addition to any and all sums hereinabove provided, the husband shall pay the sum of Seven Hundred Fifty Dollars ($750.00) to the wife's legal counsel as attorneys fees for

services rendered on behalf of the wife in connection with the aforesaid divorce proceedings, and said fees shall be paid in a lump sum from the proceedings and distribution due the husband from funds currently maintained in a trustee account at the First National Bank of Georgia, being savings account number 7-85653-7.

6.

The husband and the wife shall share equally in any tax refund for the tax year 1974 arising out of their jointly filed state and federal income tax returns.

7.

(a) The husband shall maintain in full force and effect policies of major medical and hospitalization insurance covering the children comparable to that maintained by the husband on December 16, 1974, and the husband shall pay one-half of the medical, dental, and orthodontic expenses, and one-half of the cost of any prescribed medicines incurred on behalf of each of the two (2) children not covered by the

aforesaid insurance. Should the husband become eligible for a group dental care program offered by an employer, he shall acquire the maximum of such coverage available.

(b) The husband further agrees to maintain and to pay the premiums when due and to cause the children to be named as beneficiaries under a minimum of Twenty Five Thousand Dollars ($25,000.00) in life insurance, said minimum amount to be increased by Ten Thousand Dollars ($10,000.00) of additional insurance within one (1) year of this agreement, an additional Ten Thousand Dollars ($10,000.00) to be purchased within two (2) years of this agreement, and an additional Fifteen Thousand Dollars ($15,000.00) to be purchased within three (3) years of this agreement, for a total of Sixty Thousand Dollars ($60,000.00) in life insurance.

(c) The wife agrees to maintain and pay the premiums when due and to cause the children to be named as beneficiaries under a minimum of Ten Thousand Dollars ($10,000.00) in life insurance, said minimum to be increased by Five

Thousand Dollars ($5,000.00) of additional insurance within one (1) year of this agreement, an additional Five Thousand Dollars ($5,000.00) of additional insurance within one (1) year of this agreement, an additional Five Thousand Dollars ($5,000.00) to be purchased within two (2) years of this agreement, and an additional Five Thousand Dollars ($5,000.00) to be purchased within three (3) years of this agreement, for a total of Twenty Five Thousand Dollars ($25,000.00) in life insurance.

8.

The property jointly and/or severally held by the parties shall be divided as follows:

(a) The principal sum of Seven Thousand Two Hundred Ninety-Eight Dollars and Fifty-Four Cents ($7,298.54) representing the proceeds from the sale of the parties' former residence at 3516 Brookview Drive, Marietta, Georgia, currently on deposit in a trustee savings account, being First National Bank of Atlanta, Georgia, Number 7-85653-7 in the

sum of Seven Thousand Two Hundred Ninety-Eight Dollars and Fifty-Four Cents ($7,298.54) shall be divided, the sum of Three Thousand Four Hundred Forty Three Dollars ($3,443.00) to be distributed to the husband, and the sum of Three Thousand Eight Hundred Fifty Five Dollars and Fifty-Four Cents ($3,855.54) to be distributed to the wife; any interest on said funds shall be divided equally between the husband and the wife.

(b) Each party will own the automobile presently being driven by that party.

(c) The furniture, fixtures, appliances, furnishings, and other items of personal property formerly located at 3516 Brookview Drive, Marietta, Georgia, shall be the property of the wife, subject to the conditions and modifications found at Exhibit "A" appended hereto and incorporated herein.

(d) The furniture, fixtures,

appliances, furnishings, and other items of personal property located in the husband's apartment at 1421 North Morningside, Atlanta, Georgia, shall be the property of the husband, subject to the conditions and modifications found at "Exhibit "A" appended hereto and incorporated herein.

(e) The husband shall retain sole and exclusive ownership of a certain lot held in his name and located in the State of New York.

(f) The wife shall have exclusive ownership of any and all stocks, bonds, or other securities presently issued in her name.

(g) The husband shall have exclusive possession of any and all stocks, bonds and/or securities presently issued in his name.

The above listing comprises all of the personal and real property presently owned by either or both of the parties and each party

will cooperate fully with the other in effectuating the above-stated division of the same. Any property or other interest hereinafter acquired by either party shall be owned solely by that party and not subject to any claim by the other unless the same arises by reason of a breach of the terms of this Agreement.

9.

The husband will assume responsibility for all obligations and debts of the parties which accrued prior to January 1, 1975, and any debts or obligations arising thereafter and not provided for herein will be the sole responsibility of the party causing the same. Provided, however, that the husband shall pay $112.00 of the debt owing on the children's schooling and the wife shall pay the remainder.

10.

The wife shall have exclusive custody of the said children and full control and supervision of their care, guidance, maintenance and education subject only to the following:

(a) The husband shall have every reasonable opportunity to visit and spend time with the children, provided that he shall give twenty-four (24) hours notice to the wife of his desire for visitation; and

(b) Notwithstanding the foregoing, and subject to the wife's vacation schedule, the husband shall have the right to have said children with him at least six (6) weeks during public school summer vacations until each child shall have reached the age of ten (10) years and ten (10) weeks during the public school summer thereafter, provided that the husband shall give at least two (2) weeks advance notice to the wife of his intention to exercise this visitation right and provided the husband shall bear the reasonable costs of transporting said children to and from their residence, and in addition, it is further agreed as follows:

(1) The husband shall have said children every Father's Day from 8:30 a.m. to 10:00 p.m., and the husband shall bear the reasonable cost of transportation of the children to and from their residence; and

(2) The mother shall have said children every Mother's Day; and

(3) The husband shall have said children on alternative annual Thanksgivings beginning at 12:05 p.m. on Thanksgiving Eve and continuing until the Sunday following Thanksgiving Day at 10:00 p.m., the first such Thanksgiving visitation being in 1976; and

(4) The husband shall have the children on alternative annual Christmas holidays beginning at noon on December 24

up to and including 10:00 p.m. the following December 30 for purposes of Christmas visitation, and the husband shall bear the costs of any reasonable transportation of the children to and from their residence, the first such Christmas visitation being in the year 1975.

(5) The parties shall confer with each other on all important matters pertaining to the health, welfare, education and upbringing of the Children, with a view towards arriving at a harmonious policy calculated to promote the Children's best interest.

11.

The husband, so long as he makes the payments herein called for to the wife for her support and that of the children as the same

fall due, and complies with his other obligations hereunder, he shall have the sole and exclusive right to claim the said children as his dependents for federal and state income tax purposes.

12.

This Agreement is intended to provide for the full future obligations as between the parties hereto based on the present income and financial condition of the husband and the wife, and neither party hereto shall be barred from seeking a revision of the same under the provisions of Georgia Code Annotated §30-220, et seq. This Agreement constitutes the entire understanding between the parties, and there are no representations or warranties other than expressly herein set forth. Except as provided herein, no modification or waiver of any of the terms hereof shall be valid unless in writing and signed by both parties. No waiver of any breach hereof or default hereunder shall be deemed a waiver of any subsequent breach or default of a same or similar nature.

13.

The parties hereto agree that this Agreement shall be offered into evidence in the currently pending divorce action and if acceptable to the Court, this Agreement shall be incorporated into and made part of the final decree and judgment.

IN WITNESS WHEREOF, the parties have hereunto set their hands and affixed their seals to three (3) counter-parts of this Agreement, each of which shall constitute an original, this 23rd day of June 1975.

/s/ Thomas Reis
Witness as to Wife

/s/ Carolyn Eliabeth Pratt Perry, by T. Reis, Atty.

/s/ Benjamin Abby
Witness as to Husband

/s/ Richard Donald James Perry

ORDER

The same is made the order of Court.

/s/ JUDGE

GEORGIA, FULTON COUNTY,

I, do certify that the within and foregoing is true, complete and correct copy of the original in said case, as appears by the original on file and of record in the office of Clerk of Fulton Superior Court. Consisting of 104 pages

Witness my hand and the seal of said Court this the 18th day of January, 1984

/s/ Estelle W. Roberts
DEPUTY CLERK, FULTON SUPERIOR COURT